(15)

No. 90-970

In the Supreme Court of the United States

OCTOBER TERM, 1990

LECHMERE, INC.,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF

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Petitioner Lechmere, Inc. ("Lechmere") respectfully submits this reply to the brief filed on behalf of respondent National Labor Relations Board ("NLRB" or the "Board") in opposition to Lechmere's brief on the merits.

This reply addresses two of the Board's central themes. First, the Board contends that *Babcock & Wilcox* permits balancing of employees' Section 7 rights against property owners' right to deny access to union organizers, as if these two rights were in equipoise. Resp. Br. 22-24. *Babcock & Wilcox*, however, was a mandate that a property owner's right to exclude be jealously guarded; it is a right that can be compromised only after the General Counsel has met the exacting threshold

of proving that access was necessary to protect employees' Section 7 right to be reached by union organizers.[1]

Second, the Board repeatedly expounds that because its sanctioned intrusion on Lechmere's property would be "incremental" or "de minimis", then regardless of whether the General Counsel has met the threshold showing of necessity, Lechmere committed an unfair labor practice under the Act by excluding an incremental trespasser from its property. Resp. Br. 28-30, 34-35. Yet, the degree of intrusion, or the hardship suffered by the property owner, is a red herring that plays no role in the initial inquiry that the Court decreed in *Babcock & Wilcox*.

Lechmere submits that this entire controversy could be reduced to two fundamental questions: First, is access to private property necessary to gain access to employees? This essentially is the reasonable alternative means analysis. Second, if there are no reasonable alternative means by which the union agents reached or could have reached Lechmere's employees, then how much access should be granted? The *Jean Country* analysis followed by the Board and the First Circuit in *Lechmere, Inc.* commingles factors that may be relevant in determining unfair labor practice liability with factors whose only relevance would be in determining an appropriate remedy upon the Board's finding that the exclusion of trespassers violated the Act. This commingling has created a presumption in favor of access that is untrue to *Babcock & Wilcox*. Pet. Br. 34-35 & n.9. Lechmere is one of many casualties of the Board's infidelity to the Court's directive.

[1] As noted in Lechmere's brief on the merits, the Union does not have a direct Section 7 right to communicate with employees. Pet. Br. 3. That the Board in *Lechmere, Inc.* sought to defend "the Union's Section 7 right" may be an indication that the Board needs to view access cases in a manner more faithful to *Babcock & Wilcox*. Pet. App. B-6.

I. The Authority for Lechmere's Assertion that Private Property Rights are Entitled to Deference is the Supreme Court's *Babcock & Wilcox* Decision Itself.

The Board argues that *Babcock & Wilcox* did not express a preference to leave intact private property rights, and that an "across-the-board presumption" in their favor would upset the careful scheme envisioned by the Court. Resp. Br. 22-23. However, the Board's present version of the "careful scheme of accommodation envisioned by *Babcock*" is revisionist. *See* Resp. Br. 23. The logic of *Babcock & Wilcox* so dictates.

Under the *Babcock & Wilcox* analysis only *property rights* are ever actually at risk. Section 7 rights, by contrast, will always be protected. The "reasonable alternative means" factor assures this result. If the Board makes a proper determination of whether there are reasonable alternative means by which the union has reached or could have reached employees, then those employees will never be denied their Section 7 rights. Contrarily, the Board's proper application of *Babcock & Wilcox* could result in a property owner's being denied the right to exclude.

Under *Babcock & Wilcox* it is thus impermissible to deny employees their Section 7 rights, but it may be permissible for the Board to order that property owners yield a right protected by the "National Government." *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). Because only property rights are at risk, they are entitled to a presumed sanctity that may only be overcome upon the General Counsel's making a strict showing of necessity. Stated another way, if property rights are upheld it will only be because employees' Section 7 rights are not at risk.

This interpretation is entirely consistent with the Court's statements that accommodation of the two rights shall be accomplished "with as little destruction of one as is consistent with the maintenance of the other", and that "[t]he locus of that accommodation may fall at differing points along the

spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context." *See Babcock & Wilcox*, 351 U.S. at 112-13; *Hudgens* v. *NLRB*, 424 U.S. 507, 522 (1976). The entire context of *Babcock & Wilcox* requires that the foregoing be interpreted only one way, to require "as little destruction of [property rights] as is consistent with the maintenance of [Section 7 rights]".

But in addition, what the Board has done in *Fairmont Hotel*, *Jean Country*, and *Lechmere, Inc.* is to jumble the very separate questions of liability and remedy. The above-quoted passages must be read to refer largely to the remedy phase of the unfair labor practice case. Lechmere asserts that accommodation of rights is a remedy, which the Board shall not provide unless and until the General Counsel has satisfied his threshold burden of proving that absent trespass, the employees' Section 7 rights will be denied.

II. The Board's Repeated Measurement of the Degree of Harm Done to Lechmere's Property Interest is Irrelevant to the Question of Whether Access is Necessary for the Protection of Employees' Section 7 Rights.

Both the First Circuit and the Board in *Lechmere, Inc.* concluded that granting Union organizers access onto Lechmere's parking lot would be "minimally disruptive", and would not be a "substantial" impairment of its property interest. Pet. App. A-21, B-6. The Board has now emphasized this characterization by quantifying the infringement as "incremental", "not substantial", "comparatively slight", "minimal", and "de minimis". Resp. Br. 13, 20, 23.[2] Measuring the degree of

[2] The Board argues that "when the degree of intrusion on private property is comparatively slight, such as where the property is open to the general public, the Board has not relegated nonemployees to *comparatively ineffective alternative means.*" Resp. Br. 21 (emphasis added). Comparing the effectiveness of the alternative means is not rooted in *Babcock & Wilcox*, which requires only that employees be reached, not that they be convinced. Pet. Br. 23-25.

impairment of the property owner's interests does not go to the "nature and strength" of Lechmere's property rights, but rather is used in this case to belittle Lechmere's arguments and to rationalize the Board's ordering an unnecessary trespass. In essence, the Board is making an arbitrary determination of the hardship suffered by the property owner, and using that hardship to support its argument that employees have not been reached.

It serves no purpose to quantify the injury to the employer's property interest because the interest at issue is the right to exclude, which is either taken completely or not at all. Pet. Br. 3 n.3 (citing *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 831 (1987)). The notion of an "incremental" or "comparatively slight" infringement on the right to exclude soon becomes irrational. After all, there was no intrusion of any great weight when union organizers peacefully posted themselves in a large employee parking lot at the Babcock & Wilcox plant. *Babcock and Wilcox Co.*, 109 N.L.R.B. 485, 490, 34 L.R.R.M. (BNA) 1373 (1954). Indeed, an argument can be made that this would be *less* intrusive to an employer's property rights because, unlike a retail store setting, there is no potential annoyance to customers or third parties. Nevertheless the Supreme Court upheld the employer's right to exclude.

Nor does measuring the degree of impairment resolve the question of unfair labor practice liability, in which the focus of the inquiry is on reasonable alternative means; or remedy, where the focus shifts to determining what access will be necessary for union organizers to reach employees. That the Board repeatedly makes reference to such an irrelevant factor underscores how far its approach has strayed from the underlying question of whether union organizers can reach employees absent access.

The nature and strength of the respective Section 7 and private property rights are essential to resolving the question of union access to private property. As the foregoing demonstrates, however, not all factors that the Board evaluates under

the guise of "nature and strength" are relevant to the question of access.

Furthermore, even those factors that are relevant to the question of access are not applied in a thoughtful manner. As set forth in Lechmere's brief on the merits, *Jean Country* has caused *Babcock & Wilcox* to devolve into an unwarranted diminution of the right to *exclude* simply because an employer exercises its coexisting and equally secure right to *invite* patrons for the purpose of transacting business. Pet. Br. 21; *See Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 580 (1978) (Rehnquist, J., dissenting). The Board states that the "openness of the property is a relevant consideration" because there is "less concern that the presence of outsiders would impair the normal use of the property" and that the employer's reliance on its property interest now has "diminished force." Resp. Br. 28, 29. The fact that the Lechmere store is open to the public may be significant, not because it evidences a generally weakened property right, but rather in determining reasonable alternative means, in that if the employees are indistinguishable from the general public, then the target audience may be difficult to identify.[3] The Board has yet to acknowledge that property owners possess the right to exclude which does not wane with each invited guest. *See Central Hardware Co.* v. *NLRB*, 407 U.S. 539, 547 (1972) (noting that nearly every retail and service establishment is "open to the public" and any infringement of "long-settled rights of private property" on that basis is unwarranted).

Accordingly, not only does the brief filed on behalf of respondent National Labor Relations Board perpetuate the faulty image of a scale that is balancing Section 7 rights and private property rights as if they were rights of equal weight and standing, but it also demonstrates how the Board since *Fairmont Hotel* and *Jean Country* has failed to examine the

[3] This is not so in the case at hand, where employees reported for work before the arrival of the store's customers, and where they remained on the premises after the store closed. J.A. 22-23, 73-74; Pet. Br. 26 n.7.

nature and strength of those rights in a manner that will facilitate its determination of whether access is truly necessary.

Lechmere respectfully requests that the judgment and decree of the United States Court of Appeals be reversed and enforcement of the order of the National Labor Relations Board be denied.

Respectfully submitted,

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